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IN THE

Supreme Court of the United States

October Term, 1945
No. [redacted] 37

EDNA W. BALLARD and DONALD BALLARD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1945
No.....

EDNA W. BALLARD and DONALD BALLARD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA:

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

Edna W. Ballard and Donald Ballard pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit rendered and entered June 29, 1945 [R. 1630] affirming the convictions of Edna W. Ballard and Donald Ballard for a violation of 18 U. S. C. A. Para. 338, prohibiting the use of the mails in fraudulent transactions.

The opinion of the Circuit Court of Appeals [R. 1629] dated June 29, 1945, appears at . To this opinion, written by Judge Stephens, concurred in by Judge Mathews, consisting of one paragraph, there was a dissenting opinion by Judge Denman consisting of thirteen pages. However, said dissenting opinion was withdrawn by

Judge Denman while petition for rehearing was pending. [R. 1631.] Appellants petitioned for a rehearing and on December 26, 1945 it was denied, Judge Stephens writing the opinion, concurred in by Judge Mathews. [R. 1633-37.] To this opinion denying petition for rehearing Judge Denman wrote a dissenting opinion. [R. 1638-60, and reported at .....]

Petitioners were convicted and sentenced on February 17, 1942 for violation of 18 U. S. C. A., Para. 338 [R. 170-1] and, on appeal from such conviction, said conviction was reversed by the Circuit Court of Appeals for the Ninth Circuit by opinion written by Judge Mathews, concurred in by Judge Denman, with Judge Stephens dissenting, filed June 21, 1943. (138 F. (2d) 540; C. C. A. 9, 1943.)

Upon certiorari this Court reversed the Circuit Court. (*U. S. v. Ballard*, 322 U. S. 78, 1944.) Mr. Justice Douglas wrote the majority opinion which was concurred in by Mr. Justices Black, Reed, Murphy and Rutledge. Mr. Chief Justice Stone wrote a dissenting opinion, concurred in by Mr. Justice Roberts and Mr. Justice Frankfurter. Mr. Justice Jackson wrote a separate dissenting opinion.

Said Supreme Court opinion remanded the cause to the Circuit Court of Appeals, Ninth Circuit, for further proceedings in conformity with said opinion where, after supplemental briefs were filed and the case argued, that court rendered the decisions above mentioned.

The opinion of the Circuit Court of Appeals, on June 29, 1945, consists of one short paragraph, and it is only in the opinion rendered on denial of rehearing that the majority of the court give any reasons for their conclusions. In voting for rehearing, Judge Denman wrote an

opinion containing a comprehensive discussion of most of appellant's contentions and complying with this court's order and opinion.

Jurisdiction

The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1935 (Para. 347), Title 28, U. S. C. A. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court May 7, 1934.

Statement.

The indictment charges that the defendants, together with Guy W. Ballard, now deceased, and divers other persons, between the early part of 1930 and the date of the filing of the indictment, did devise a scheme and artifice to defraud by means of false and fraudulent representations. The general allegations of the scheme and plan are alleged in paragraphs (a) to (i) inclusive. Subdivisions 1 to 20 of paragraph (i) set forth the particulars of the alleged misrepresentations. Thereafter are set forth the mail fraud Counts I to XII. [R. p. 2 to 63 incl.]

An examination of the indictment shows that as to its charging allegations it is couched in most general terms.

The indictment alleges the defendants schemed:

(a) To induce persons to become members of "I AM" and to form "I AM",

(b) To form Saint Germain Foundations,

(c) To induce defrauded persons to give money and property to Saint Germain Foundations,

(d) To form Saint Germain Press,

(e) To induce people to be defrauded to purchase from Saint Germain Press,

(f) To sell to people to be defrauded, pictures, charts, etc.,

(g) To establish reading rooms and to conduct meetings and classes and lectures at said reading rooms re principal precepts and doctrines,

(h) To conduct radio broadcasts for instruction in the precepts and doctrines of the "I AM",

(i) It is alleged that as a part of the aforesaid scheme and to induce persons to become members, obtain money, sell the aforesaid charts, books, etc., the defendants made certain misrepresentations which are set forth in subdivisions 1 to 20 of sub-paragraph (i).

The allegations of said subdivisions 1 to 20 of sub-paragraph (i) are somewhat repetitious. They can be grouped under the following headings and we then find the petitioners were charged with making false and fraudulent representations concerning:

1. IMMORTALITY (Subdivisions 1 and 6);

2. DIVINE APPOINTMENT AND SELECTION (Subdivisions 2, 3 and 43;

3. TEACHINGS CONDUCIVE TO ATTAINMENT OF EVENTUAL SALVATION (Subdivision 5);

4. BOOKS, MAGAZINES, LITERATURE AND OTHER ARTICLES AND PARAPHERNALIA CONDUCIVE TO EVENTUAL SALVATION (Subdivisions 10, 11 and 14);

5. HEALING (Subdivisions 7 and 8);

6. PRECIPITATION (Sudivision 9);

7. CATACLYSMS (Subdivisions 12 and 16);

8. DIVINE INSPIRATION AS TO SAINT GERMAIN'S PICTURE (Subdivision 13);

9. PROMISE OF APPEARANCE OF ASCENDED MASTERS (Subdivision 15);

10. FORBIDDANCE OF CRITICISM (Subdivision 17);

11. PROMISE OF ASCENSION (Subdivision 18).

Subdivisions 19 and 20 are general allegations to the effect that all of the representations in subdivisions 1 to 18, inclusive, were knowingly and intentionally fraudulent.

A summary of the evidence shows that the defendants are all members and leaders of the "I AM" Activity, a religious organization which was founded in about the year 1932, upon teachings received by the now deceased Guy W. Ballard, husband of the defendant Edna W. Ballard, through revelations from Ascended Masters, particularly from one of the Ascended Masters, Saint Germain. [R. 243.] Mr. Ballard received these revelations commencing in the latter part of 1930 and until shortly before his death, in December of 1939. These teachings were disseminated through classes held by Mr. Ballard and other defendants, through the formation of groups of students and by the distribution of books and magazines. [R. 254-5.]

The members and students of the "I AM" Activity are chiefly found in the United States, but the Activity has groups in Canada and in several foreign countries. It is estimated that the number is, at the very least, 300,000 and may be many times that number. [R. 250-51.]

Groups, reading rooms and sanctuaries were established in practically every large city of the United States

and in a great number of the smaller ones. At the present time there are hundreds of these groups maintaining reading rooms and sanctuaries. [R. 250-51.]

In the reading rooms literature which contains the basis for the teachings is maintained and may be read by anyone who desires, without charge of any kind. It is also to be found in most of the large libraries of the country, including the Congressional Library, and has been published in Braille. [R. 246.]

The various groups are not financially accountable to the head of the organization. Their expenses are defrayed by themselves. The groups are not required to in any way contribute to the leaders of the organization. However, as to the manner of conducting the meetings, as to the subjects which shall be taught and as to the manner in which they may be taught, the groups are controlled and directed by the head of the organization. The activities of the Movement are carried on through Saint Germain Foundation, a non profit corporation. [R. 240.]

The finances of the organization are all received either through voluntary donation or love gifts from its students or from the proceeds of the books, and religious articles used in the Activity. No dues, membership fees or tithings are charged or asked for, and the individual groups are not financially responsible to or dependant upon the central organization, conducted by the Ballards. [R. 249-51.]

All monies received by the Ballards, as leaders of the Activity, whether from love gifts, donations or from sales or otherwise, are in turn used by the Ballards in the advancement and expansion of the Activity. [R. 249-51.] The Ballards, of course, as well as the other

messengers, necessarily defray their living maintenance and overhead expenses and the expenses of traveling of themselves and staff from place to place from income of the Activity.

The Ballards are the Accredited Messengers of the Ascended Masters and with their son Donald, and others of the defendants who are appointed messengers, conduct classes in various cities throughout the United States, which classes are, in effect, congresses at which the Ballards and other appointed messengers teach and explain the precepts and doctrines of the "I AM" Activity. [R 263-1145.] These classes are attended by group leaders, students and others who may be interested, some of the larger classes having attendance of as many as 5000.

All revelations of the Activity were, as aforesaid, received by Mr. Ballard during his lifetime, and since the death of Mr. Ballard the named defendants and many others have been engaged in expounding the teachings contained in these revelations.

There is a monthly magazine, which publishes the teachings of the "I AM" Activity, known as "The Voice." [R. 241.]

The Activity teaches the existence of the Supreme Being, God, ascension with eventual immortality, a series of re-embodiments until a state of perfection is reached and a most elevating and comprehensive use and application of the principles of faith. [R. 245.] The Activity believes in a high code of morals, forbids the use of intoxicants, tobacco and over-indulgence in sex. It believes generally in the attainment, by each individual, of harmony and perfection. In respect to the attainment of harmony, the Activity does not believe in the use of harsh colors and the use of animal flesh in diet. [R. 261; 1018.]

The Ascended Masters, in whom the "I AM" Activity believes, are Divine Beings who exist in an intermediate sphere between God and Man. The Ascended Masters are particularly devoted to the assistance of mankind in the attainment of high moral standards, harmony and eventual salvation. There are many Ascended Masters, Saint Germain being the most prominent in the "I AM" Activity. The words "I AM" denote the existence and relationship of the God Being in or to each individual. [R. 243-6 incl.]

From the filing of the indictment through to the denial of the motion for new trial, the defendants questioned at every opportunity the sufficiency of the indictment and the sufficiency of the evidence offered in support thereof. [R. 64-108; 111-145.]

Defendants also moved to quash the indictment and at the commencement of the trial challenged the petit jury on the ground that women had been improperly excluded from the jury panels. The motion to quash was denied and the challenge overruled, to which the defendants duly excepted, thereafter assigning such rulings as error. [Specification of Error, Assignments II, III, IV and V, R. 191-2.] Justice Denman, in his opinion on denial of rehearing, held said rulings to be reversible error. [R. 1655.]

Midway in the presentation of the Government's case the Court gave the alleged erroneous instruction to the jury treated by this Court in its opinions. That is the instruction which removed from the jury consideration of the truth or falsity of defendants' religious doctrines and teachings.

The petitioners complain of the conduct of the prosecuting attorneys in the course of the trial and during

argument. Under the proper subdivision, we have set forth *in haec verba* the statements of counsel of which complaint is made. Suffice, at this point, to state that counsel for the Government did not abide by the ruling of the trial court above mentioned that verity of defendants' beliefs was not an issue, but denounced the defendants for not producing in court visible proof of the verity of certain of their concepts, and also denounced defendants for not being able to make certain of their religious beliefs work efficaciously upon themselves. The teaching of the Activity concerning the ascension of the body after death was likened to the antics of characters in the funny paper, particularly "Superman", and the Ascended Master Saint Germain was denominated "Mrs. Ballard's Charlie McCarthy." Continual intemperate denunciations of the defendants as "fakes", "frauds" and "charlatans" occurred. In one instance, such denunciations were predicated upon the fact that it was claimed defendants had not been able to prove the effectiveness of their religious beliefs upon themselves. Judge Denman held that this misconduct also constituted reversible error.

The Circuit Court of Appeals in its original opinion reversing the conviction in the trial court did so almost entirely upon the ground that the trial court erred in withdrawing from the jury the truth or falsity of defendants' religious doctrine when the truth or falsity of those doctrines was alleged in the indictment as the misrepresentations relied upon by the Government. The Circuit Court, in its said opinion, did not determine the questions involved, as now presented here.

This Court, in its opinion reversing the Circuit Court of Appeals, remanded the case back to the Circuit Court of Appeals for further proceedings in conformity to its

opinion, particularly for consideration and determination by the Circuit Court of the other questions not decided by it in its former opinion (and as now presented in this petition) in order that such questions could be fully presented and passed upon first, by the Circuit Court, and then if questions of importance survived, that they could be presented to this Court fully briefed and argued, at which time this Court would then have the benefit of the views of the Circuit Court.

In this connection we respectfully call this court's attention to the fact that at the time this matter was before this court on oral hearing on March 3rd and 6th, 4, at the commencement of argument the Chief Justice directed counsel for defendants to confine the argument to the question as to whether or not the ruling of the Ninth Circuit Court of Appeals that the verity of defendants' belief should have been submitted to the jury was or was not correct; that by reason thereof counsel for the defendants were not permitted to argue orally before this court the other matters being presented in this petition and brief, and this fact is noted in the majority opinion of this court. (322 U. S. 78, at 88.)

Following the remanding of the case to the Circuit Court, supplemental briefs were permitted to be filed by both sides and further oral argument permitted in the Circuit Court. The questions herein presented for consideration in this petition were fully briefed and argued before the Circuit Court.

Thereafter, on June 29, 1945, the Circuit Court rendered its opinion, consisting only of one paragraph, and which did no more than say that it had considered the additional questions (the same herein presented in this petition) but find no error in the District Court's judg-

ment. This opinion was written by Judge Stephens and concurred in by Judge Mathews. To this opinion Judge Denman wrote a thirteen page dissenting opinion (later withdrawn as above stated) in which he gave consideration to many of the questions herein presented in this petition.

In the petition for rehearing appellants pointed out that the Circuit Court had not conformed with the direction of this Court when it failed to set forth its views as to the questions reserved thereby giving this Court the benefit of its considerations in the event of another petition for writ of certiorari. After being under submission for approximately five months, the petition for rehearing was denied on December 26, 1945. An opinion was written on denial of rehearing by Judge Stephens and concurred in by Judge Mathews (who had previously written the opinion reversing the trial court). Judge Denman filed a dissenting opinion thereto fully discussing the problems. While the opinion of the majority on this occasion is more than the one paragraph originally filed, it obviously does not weigh or consider adequately the questions presented before it and now herein presented. This fact is pointed out by Judge Denman in his dissent. He states [R. 1638]:

> "I dissent not only from the decision but also from the refusal of this court to respond to the requirement of the Supreme Court that we not only should 'pass on' the important questions raised but not decided in that court, but, in addition, give that Court the 'benefit of our views' upon them."

Such, then, is the state of the record as it now exists as we present this petition for writ of certiorari.

Questions Presented.

1. Did the misconduct of the prosecuting attorneys, in attacking defendants for not proving before the jury or elsewhere the miraculous occurrences the trial court had held were not in issue, and in ridiculing and mocking defendants' religious beliefs, and in continually attacking defendants by intemperate and highly prejudicial denunciations, and other misconduct, constitute a violation of due process and invade the defendants' right to religious liberty?

2. Did Congress intend, by the enactment of the mail fraud statute, to permit members of religious sects to be indicted and tried on a charge based on alleged falsity of religious doctrine or on a charge the gravamen of which is lack of belief in religious doctrines professed by them?

3. Can an indictment charging violation of mail fraud statute (Title 18, Para. 338, U. S. C. A.) based solely upon the alleged falsity of defendants' religious doctrines be amended during trial to allege, instead of such falsity, lack of belief in religious doctrines and teachings?

4. Is it a violation of the Constitution (Article III, Sec. 2, the due process clause of the Fifth Amendment and the impartial jury clause of the Sixth Amendment) for the clerk of court and jury commissioner, on order of the court, to exclude all women from the grand and petit jury lists, when such exclusion is systematic, deliberate and without cause, and when one of the defendants is a woman and another her son, both of whom are charged with misrepresentation in connection with religious tenets and beliefs?

Reasons Relied on for the Allowance of the Writ.

A. The decision of the Circuit Court of Appeals in deciding that the conduct of the prosecution attorneys in attacking defendants for not proving before the jury or elsewhere the miraculous occurrences the trial court had held were not in issue, and in ridiculing and mocking defendants' religious beliefs, and in attacking defendants by intemperate and highly prejudicial denunciations and other conduct, was proper permits an infringement on the constitutional rights of defendants to religious freedom and is in conflict with all other decisions as to what constitutes proper conduct of counsel in the trial of a criminal action in the federal court, and is so far a departure from the accepted and usual course of judicial proceedings, particularly in sanctioning such departure by the lower court, as to call for the exercise of this court's power of supervision.

B. The decision of the Circuit Court of Appeals, in deciding that an indictment lodged under Title 18, Sec. 338, U. S. C. A. (Mail Fraud Statute) and charging either falsity of or lack of belief in religious doctrines and teachings on the part of the defendants does not violate the provisions of the First Amendment to the Constitution affording religious freedom, has decided an important question of federal law which has not been, but should be, settled by this court.

C. The decision of the Circuit Court of Appeals, in deciding that the indictment which alleged falsity of religious doctrine and teachings could be, in effect, amended by the trial court to charge lack of belief instead of falsity of doctrine, has decided an important question of federal law which has not been, but should be, settled by

this court; or, at least, has decided such a federal question in a way probably in conflict with applicable decisions of this court.

D. The decision of the Circuit Court of Appeals, in deciding that the constitutional rights afforded to the defendants under the provisions of the Fifth and Sixth Amendments (due process and impartial jury) were not violated by the exclusion of women from the petit and grand jury panels, has decided this important question of federal law in a manner which deprives a defendant of the impartial jury guaranteed by the Constitution as such has been defined in the decisions of this court, particularly by the decision of this court in *Glasser v. U. S.*, 315 U. S. 60.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: January 25, 1946.

ROLAND RICH WOOLLEY,
RALPH C. CURREN,
JOSEPH F. RANK,
Attorneys for Petitioners.

Certificate of Counsel.

I hereby certify that I am one of counsel for the petitioners in the above entitled cause, and that in my judgment the foregoing petition is well founded and not interposed for delay.

Dated: January 25, 1946.

ROLAND RICH WOOLLEY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.....

EDNA W. BALLARD and DONALD BALLARD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Brief in Support of Petition for Writ of Certiorari.

Opinions Below.

The date of the judgment of the trial court was February 17, 1942. The opinions of the Appellate Court were rendered and filed June 29, 1945. [R. 1629; Federal Reporter (2nd).]

The judgment of the Appellate Court was entered June 29, 1945. [R. 1630.]

The petition for rehearing was denied with opinion on the 26th day of December, 1945. [R. 1633-7.] [Dissenting opinion, R. 1638-60.] .....Fed. Rep. (2d) .....

Jurisdiction.

The statute under which jurisdiction of this Honorable Court is invoked is Sec. 240 Judicial Code (28 U. S. C. A. 347). Grounds for invokement of jurisdiction are that the questions presented by appellants constitute grave questions of constitutional law involving the rights of defendants under the First, Fifth and Sixth Amendments to the Constitution. Each point involves, in one or more of its aspects, a matter of first impression in this court. It is the appellants' contention that the decision of the Circuit Court of Appeals by approving the conduct of government counsel not only permits the rights of a defendant to religious liberty to be infringed upon, but, in addition, sanctions such departure from the usual course of judicial procedure in the trial court as to call for the exercise of jurisdiction by this court.

Statement of the Case.

We have set forth in our petition a statement of the case under the heading "STATEMENT." For the sake of brevity, we will not repeat it here, but certain matters contained in the record will be adverted to under appropriate argument headings.

Specification of Errors.

1. The Circuit Court of Appeals erred in approving and holding proper the conduct of prosecuting attorneys in attacking defendants for not proving before the jury or elsewhere miraculous occurrences the trial court had held not to be in issue, in ridiculing and mocking defendants' religious beliefs, in attacking defendants by intemperate and highly prejudicial denunciations and in other respects.

2. The Circuit Court of Appeals erred in holding that members of a religious sect may be indicted and tried under mail fraud statute on a charge the gravamen of which is falsity of religious representation or even of mere lack of belief in religious doctrines professed by them.

3. The Circuit Court of Appeals erred in holding that an indictment based solely upon the alleged falsity of defendants' religious doctrine may be amended in the course of the trial to allege instead of falsity, lack of belief by the defendants in their religious doctrine and teachings.

4. The Circuit Court of Appeals erred in holding that it is not a violation of Article III, Sec. 2 of the Constitution, of the due process clause of the Fifth Amendment and impartial jury clause of the Sixth Amendment for the clerk of court and jury commissioner, on order of the court, to excuse all women from the grand and petit jury lists, when such exclusion is systematic, deliberate and without cause, and when one of the defendants is a woman and another her son, both of whom are charged with misrepresentation in connection with religious tenets and beliefs.

ARGUMENT I.

The Misconduct of the Prosecution in Attacking the Defendants for Not Proving Before the Jury or Elsewhere the Miraculous Occurrences and in Ridiculing the Religious Tenets of the Appellants and in Other Respects, Violates Due Process as Well as the Accuseds' Freedom of Religion.

The majority of the Circuit Court, in denying the petition for rehearing, gave some attention to the contention of appellants that the conduct and argument of counsel for the Government were improper and not in accord with the decision of this court nor in accord with the direction of the trial court. The majority states, in conclusion:

> "We discern nothing in counsel's argument on either side not *fully within the concepts of honorable members of the American bar.*"[1] (Majority Opinion on Denial of Rehearing, R. 1637.)

By turning to the dissenting opinion in this case, where a portion of the instances of misconduct are set forth *in haec verba*, one can ascertain what is proper conduct and argument in a case involving the religious freedom of defendants. From that dissenting opinion, and without reverting to the record in the case, one finds, if we are to follow the majority opinion, that the following conduct is proper:

1. To taunt and denunciate the defendants for not producing in court, or elsewhere, physical proof of miraculous occurrences (the First Amendment to the Constitution notwithstanding);

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[1]Italics in this brief are counsel's unless otherwise stated.

2. To taunt them because they cannot prove what they believe;

3. To ridicule their religious concepts as unbelievable and as being from the funny papers;

4. To give their own personal opinion as to the occurrence of matters the defendants considered divine;

5. To prey upon the emotions of the jurors stirred by our participation in the great war;

6. To repeatedly denunciate the defendants in conjunction with the foregoing as liars, cheats, charlatans and religious racketeers. [R. 1644-6.]

And, from the majority opinion:

7. To seek to obtain a conviction on the ground that it will be a warning to others. [R. 1637.]

This is a case of first impression as to what constitutes misconduct of counsel in a case involving religion. We do not believe that this court will permit the decision of the Circuit Court, which makes the conduct aforesaid an exemplary pattern for the American Bar, to become law in this country. This court will observe that the Circuit Court of Appeals *does not predicate its ruling on the ground that the conduct was not reversible error—it holds the conduct to have been proper.*

In the former decision in this case this Court stated:

> *"Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.* Religious experiences which are as real as life to some may be incomprehensible to others. Yet *the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."* (322 U. S. at p. 86-87.)

This Court reversed the Circuit Court of Appeals on the ground that it had improperly decided that the truth of religious concepts should be inquired into on a trial under an indictment charging their falsity. Tested solely by said ruling and statement of this court, and ignoring for the moment all that this court has said on other occasions concerning what constitutes improper argument, the conduct of counsel was prejudicially erroneous and deprived the defendants of a fair trial.

One of the religious doctrines and beliefs alleged in Paragraph IX of the indictment is that the defendants represented that Guy W. Ballard, Edna W. Ballard and Donald Ballard had a divine and supernatural ability to bring forth from a supernatural state, money, riches and other material needs necessary to mankind, when the defendants knew that they had no such supernatural power of precipitation.

This court upheld the District Court's ruling excluding from the jury evidence concerning representations and statements of miraculous experiences, and, in effect, approved the statement of the trial court that whether the incidents actually happened or not was not for the consideration of the jury. (322 U. S. 81.)

However, notwithstanding the course that the court *stated* would be followed, it allowed the jury to speculate, speculated itself and informed the jury counsel would take up the matter of precipitation in argument. As Judge Denman states:

> "Despite this warning of the district court to the jurors, they were speculating on the 'highly improbable' divine and supernatural ability of precipitation from a supernatural state, money, riches, and other material needs.' From the jury box one of them

asked one of the defendants, 'I have one question. I just wanted to ask the witness if he ever precipitated anything.' The witness' answer did not satisfy the jurror and he repeated, 'Answer my question. Did you precipitate anything?'

"Whereupon the court abandoned its ruling excluding evidence upon which the jury could 'speculate' 'whether these incidents actually happened.' Instead of declaring the question of the happening of the fact of such a 'divine' miracle as irrelevant and its pursuit a denial of the accused's religious liberty. the court itself asked, 'Did you yourself ever precipitate?'

"* * * Colloquy ensued and the juror stated, 'Isn't that something different from what we have been talking about as precipitation?' The court then ruled, *'That is going to be a matter for the attorneys on both sides to argue to the jury, and that* (the fact of precipitation) *will be a matter for you gentlemen to decide.'"* (Opinion Upon Denial of Motion for Rehearing. [R. 1643.][2] (Emphasis by Judge Denman.)

It is with this background that the counsel for the Government approached the argument of the case and made what Judge Denman properly denominates "the following sneering remarks about the absence of any proof of such divine and supernatural happenings as the precipitation of precious metals":

"Betty Mundy has no doubt, Louise Majerus has no doubt, Donald Ballard is one of the accredited messengers of the ascended masters, and he certainly

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[2]All references to Judge Denman's opinion are to his opinion dissenting from denial of rehearing.

has no doubt, and Mrs. Ballard, as the big-wig, the chief, of the entire organization, certainly could have no doubt whatsoever—to say nothing of William Cassiere and Paul Stickell, those traveling salesmen for the Ballards, they certainly would have no doubt yet, gentlemen, *have they managed to precipitate gold or jewels?* If they have, I submit that *we should have been told about it here in court. Possibly we should have had an example of such precipitation shown us.*" [R. 1235.]

"* * * He himself *had not been able to precipitate,* apparently because he was not sufficiently pure. That same dog chasing that same tail. And yet Paul Stickell was sufficiently pure to be appointed a messenger by Saint Germain. [R. 1303.]

"* * * and I submit, gentlemen, that if it is such that the Ballards, as the accredited messengers of the ascended masters, those mighty people who have never made any mistakes, those perfect beings, *should have been able to precipitate and should have been able to precipitate some of their needs* instead of taking money from poor people who had given much more than frequently they could afford to this movement through love gifts and through the purchase of books." [R. 1233.]

Judge Denman points out two other instances where defendants were taunted for not producing evidence of supernatural occurrences, as he states [R. 1644-5]:

"Again, disregarding the court's ruling regarding the truth of such a miraculous happening, the prosecution built an argument upon Donald Ballard's denial that he in fact had ever ascended. Also, to meet the statement of Mr. Ballard, Sr., as to their com-

munion with the ascended master, St. Germain, that 'Mrs. Ballard and Donald and I have stood in the visible, tangible, presence of our blessed ascended master Saint Germain many, many times', the prosecution stated to the jury, 'Now DID *Donald Ballard have these experiences* or didn't he? One of the reasons *we know he didn't have these experiences* was that he wasn't the practiced and experienced actor that Mrs. Edna W. Ballard was'.

"Again, against the excluded issue of the actuality of the happenings, the prosecution in its opening argument claimed the evidence failed to show that Mrs. Ballard 'actually did associate with the gods' in the following argument: 'Now, of course, if Mrs. Ballard actually did associate with the gods, you can well understand how these various people that joined the movement would join the movement and would stay in the movement; but I don't think she did, and I don't think the evidence shows that she did.'

"In the closing argument this was reiterated in the statement, 'People were told that if they would follow these teachings they would ascend, and they knew they couldn't. And that is a bad faith. *There isn't anyone that has ascended that you know of here.*'

"As to the supernatural power of healing the sick, charged in the indictment as construed by the Supreme Court as no more than something claimed but not believed, the prosecution again taunts the Ballards with failing to prove the *fact* of such divine healing by 'producing witnesses who had actually been cured' and who 'were grateful to the Ballards for curing these incurable diseases.'" (Emphasis by Judge Denman.)

We realize that this court is primarily concerned with whether the decision of the Circuit Court of Appeals determining what is or is not misconduct in the prosecution of a religious case correctly enunciates the law on the subject. We feel justified, however, in adding to the examples given by Judge Denman others which do not appear in the opinion lest the court assume that it contains all of the conduct of which complaint is made.

Demand of the Government that defendants have, for the jury, proof of the efficacy of their religious concepts was not limited to the matter of precipitation. Mr. Neukom, of the prosecution, in discussing the teachings of the Activity concerning the retention and regaining of energy by right living, stated to the jury that if the defendants believed that by proper living and proper faith a person 60 years of age may regain the fullest bloom of youth and

> "* * * you can't make it work on yourself, you can't keep yourself from dying—you can save everyone else in the world but your religion isn't good enough for you—then you are a falsifier—and if the word rings, I don't care—*you are a cheat, you are a charlatan, and you are a religious racketeer, and I mean it.* I haven't just tried to throw words at you: I have given you evidence." [R. pp. 1540-41.]

Passing for the moment the denunciation contained in the foregoing statement, we ask the Court to consider the last mentioned remarks in the light of the statement which precedes them. The defendants are cheats, charlatans and religious racketeers *if they cannot obtain visible and physical proof of their teachings upon their own person. The ring of that statement is faintly familiar. Isn't it about what was said of Christ while He was on the*

cross—that if He was the Son of God He should come down and prove it? In describing Christ's crucifixion, while He was on the cross His persecutors, taunting Him, cried: "He saved others; Himself He cannot save. If He be the King of Israel let Him now come down from the cross and we will believe Him." (Matthew 27:42.)

By mockery and ridicule of defendants' religious concepts, particularly concerning ascension, the United States attorneys not only took advantage of the defendants by violating the court's admonition but also by such mockery and ridicule sought to make it appear to the jury that the defendants did not believe what they taught because their religious theories were unbelievable. In that connection this court not only stated on the prior hearing that men are entitled to believe what they cannot prove but further that the right of religious freedom

> "* * * embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths." (*U. S. v. Ballard*, 322 U. S. 78, at 86.)

If the foregoing statement of this court is to be translated into actual protection of religious freedom, then quite obviously a defendant must be protected in his right to maintain a theory of ascension which may differ from the orthodox and from conviction of mail fraud by arguments based upon ridicule—arguments which seek to convince jurors that the defendants do not believe in a religious concept because it is too ridiculous to believe. Yet Judge Denman points out counsel compared the experiences of one ascending in accordance with the beliefs

of the Activity to the conduct of Superman. [R. 1646.] The statement quoted by Judge Denman is as follows:

> "'Ascension was an exciting painless and adventurous sort of thing. You wouldn't have to pass through death, at least at first, until Mr. Ballard became quite ill and it was evident that he was going to die; you just sort of rise up in the air and would be able to come back and forth as you desired, become invisible or visible, as you wished. *Superman does that frequently, and it is a very interesting and exciting sort of thing.* * * *'"

In another instance Mr. Lazarus read from the May, 1936, issue of "The Voice" [Exhibit 13], as follows:

> "All should understand that when one has made his ascension he becomes a Wholly Perfect Being of such Purity and Radiance that all who contacts him realize that he is superior in every way to all other beings. He can 'take his body anywhere he desires instantly' * * *
>
> "* * * the gravity pull of earth can no longer affect it. The body rises in the atmosphere and follows the thought, going instantly wherever the individual desires. By proper application the individual can release into and through his body the Light needed to increase the vibratory action to the point where the body can rise into the air and become invisible or visible as the Ascended Masters are able to do."

He then stated:

> *"That sounds as though it came from Donald Ballard and his 'Popular Mechanics.'"* [R. 1237.]

The mental attitude and motive of counsel for the Government was exposed early in the trial when Mr. Lazarus, while cross-examining Mrs. Ballard and asking her concerning the Activity's beliefs suddenly said:

> "Have you ever read Grimm's Fairy Tales, Mrs. Ballard?" [R. 1155.]

and when, later, in the same examination, while questioning concerning cataclysms and the possibility of preventing calamities by prayer and right living, he asked the question:

> "Mrs. Ballard, were you around San Francisco during the earthquake of 1906?" [R. 1160.]

In discussing the ascended master Saint Germain before the jury Mr. Neukom stated:

> "Now, this is Saint Germain talking—Saint Germain—Mrs. Ballard's Charlie McCarthy, the most convenient thing you ever saw." [R. 1503.]

In discussing the reason people joined the movement and why it continued to be successful over a long period of time, counsel argues that it is because it is so much like the funny papers. He states:

> "We find it is very much related to Superman and Flash Gordon in the funny papers. Incidentally, they are two of my favorite comic strips. I am sure many other people have read those." [R. 1211.]

Thus we must respectfully disagree with the statement of the majority of the Circuit Court that the argument was fully within the concepts of the honorable members

of the American Bar. If, in the trial of one believing in any one of the more firmly established Christian religions, Catholic, Baptist or Methodist, such an attack were made upon the belief concerning the ascension of Jesus, and it had been ridiculed as comparable to the antics of Superman in the funny papers, we doubt that the Circuit Court would have seen fit to praise the conduct. Yet if the defendants' religious doctrine is entitled to the equal protection of the law, as this court has held in this case (322 U. S. 78, at 87) what possible excuse can it have for arguments of this character? In addition to an invasion of the rights of the defendants to religious liberty, it was an unfair blow on the part of counsel for the Government to demand proof of the supernatural when that issue had been withdrawn from the consideration of the jury. We most respectfully disagree also with the statement of the Circuit Court that if argument such as that made by Government counsel is not permitted, then the prosecution in every case will be limited to a listless, vigorless summation of fact and that advocates whose logic glowed and flowed with the heat of forensics would be eliminated. After all, trials have been conducted in the federal courts for some time in accordance with certain rules as to what constitutes proper and improper argument before the jury. It can hardly be said that the guilty have escaped punishment but rather, as is pointed out by this court, it has been found that the word of the United States attorney, as a representative of a sovereignty, carries such weight that he must be careful not to affect the defendant's rights by improper suggestions and insinuations. (*Berger v. United States,* 295 U. S. 78.)

First of all, it is the rule that:

> "In the trial of cases to a jury in the Federal Courts the arguments of counsel *must* be confined to *the issues of the case, the applicable law, the pertinent evidence* and such legitimate inferences as may properly be drawn therefrom."
>
> *London Guar. etc. Co. v. Woelfle, supra,* 83 F. (2d) 325 at 342.

The duty and obligation of the prosecuting attorney has been set forth in the leading case of *Berger v. U. S.,* 295 U. S. 78, 14 S. Ct. 629 (p. 88) where it is said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

This court and the Federal Circuit Courts have uniformally held that arguments which seek to create a prejudice, even of a sectional nature, or against a party because it is a large corporation, are erroneous. (*New York Central R. R. Co. v. Johnson,* 279 U. S. 310; 73 L. Ed. 706; *London Guar. etc. Co. v. Woelfle, supra,* 83 F. (2d) 325; *Metropolitan Life Ins. Co. v. Banian,* 106 F. (2d) 561.)

Aside from the religious considerations, the argument was prejudically erroneous. As stated by Judge Denman, the prosecuting attorney repeatedly followed the discussion of religious concepts "with such intemperate and highly prejudicial denunciations of Mrs. Ballard as 'glib' and an 'adept prevaricator'; as 'the most successful faker in the history of fakery,' 'a charlatan' and 'a religious racketeer.'" [R. 1646.] We have called the court's attention to an instance where the defendant was called a falsifier, a charlatan, and a religious racketeer, because the prosecuting attorney claimed the defendants were not able to make their religious concepts work upon themselves. [R. pp. 1540-41.]

Judge Stephens admits that at the very outset the prosecution denunciated defendants as the most successful fakers in the knowledge and history of fakery. For other occasions where denunciation occurred see R. 1283, 1267, 1244-5, 1318. A trial is, in no sense, a name calling contest. It is hard to see that a prosecuting attorney is performing his duty to protect the rights of the defendant by going before the jury with intemperate denunciation.

Similar and lesser denunciation requires a reversal of the verdict.

Volkmor v. U. S., 13 F. (2d) 594—(defendant called a "skunk"—"a weak-faced weasel," "a cheap, scaly, slimy crook");

Rouse v. Burnham, 51 F. (2d) 709—(plaintiff's counsel called a physician a "crooked doctor" and stated that one of the defendants had "all the earmarks of a common, ordinary, enthusiastic liar," referring to the parties as "rascals and scoundrels."

London Guar. etc. Co. v. Woelfle, 83 F. (2d) 325 (counsel stated that the doctors for the insurance company "stood there like a bunch of sharks.")

In *Stephan v. U. S.*, 133 F. (2d) 87, at 98, the use of the word "blackhearted" in connection with a defendant apparently guilty of traitorous conduct was criticized as unfortunate, though the case was not reversed because the conduct was not persistent nor the case weak.

As Judge Denman notes, the prosecution climaxed their attack on defendants for not producing proof of miraculous happenings by offering in argument "his own testimony that one such alleged happening had not occurred;" —stating:

> "Now, what a cosmic light is, I don't know, but it sounds like a cataclysm to me. And I know I was here in Los Angeles on July 1, 1938, and July 17, 1938, and cataclysm or not, *I know that there wasn't any great wave of cosmic light striking at the Shrine Auditorium or any other place here at that time.*" [R. 1242.]

The prosecution also offered his testimony as to the size of the movement, the amount received by it and the portion expended for charity:

> "And there weren't three million or six million people in this movement I don't believe. I don't think there were. *I don't believe* she sold so many books. *I don't know* whether she sold a million or what she sold, *but I know* the take has been good and *I know* that the charity has been lean." [R. p. 1521-2.]

We also have the personal opinion of the attorney for the United States as to the veracity of the defendants and all of their witnesses:

> "If they have taken money from people under false pretenses, they have to bear the consequences. It isn't their build-up or their yachts. *I don't know* whether they have them or they haven't them. But they seem to have done pretty good, * * *" [R. p. 1522.]
>
> *"I don't believe what they say. I have a right, the same as any other witness.* They don't believe my witnesses. *I don't believe any witness of theirs,* but read the literature and see where you are right." [R. p. 1525.]

The prosecutor combined his personal opinion as to whether or not Mrs. Ballard had conversations with the ascended masters with an assertion that he did not think that the evidence showed she had such association, when he well know the court had directed that such evidence was no part of the case. He states:

> "Now, of course, if Mrs. Ballard actually did associate with the gods, you can well understand how these various people that joined the movement would

join the movement and would stay in the movement; *but I don't think she did,* gentlemen, and *I don't think the evidence shows that she did.*" [R. p. 1212.]

He inferred, from a statement in one of the magazines, we submit incorrectly, that the defendants desired their people to forget the Bible, when he said:

> "What could they have in their minds other than but one thing—*I believe to forget the Holy Bible,* the book that they would now endeavor to comfort themselves with. That book will give them comfort, nor should that be deprived from them. But that shouldn't change the proposition that they have defrauded people and should suffer the consequences." [R. p. 1537.]

Concerning this improper inference, the prosecution knew or should have known that it is within the realm of religious liberty to advise people to forget the Bible or any other religious document. The prosecution is not entitled to create prejudice against the defendant in the eyes of those of the jury who accept the Bible as the word of God by inferring that the defendant has done a wrong by so advising his followers.

Judge Denman further points out [R. 1645]:

> "Later, in the closing argument, the prosecutor again offered *his evidence* of the conviction of persons similarly charged and suggests a like conviction, stating 'About 25 years ago in California there was a group of people—I think two—prosecuted for mail fraud. They claimed to be the sons of God, that they had the power of Moses and Elijah, that the mantle of Jesus had fallen on them, that they had the keys to the kingdom of heaven. *They were prose-*

cuted and they were convicted, gentlemen. There are others. This is nothing unusual. And *this is going to be one more on that list, I believe.*' (Emphasis supplied.)"

In the *Berger* case this court warned that improper suggestions and insinuations of knowledge of the United States attorney are apt to carry much weight against the defendant. This same proposition is stated by Justice Roberts in the dissenting opinion in the case of *United States v. Socony Vacuum Oil*, 310 U. S. 150, as follows:

> "One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."

While a majority in that case were of the view that the misconduct of counsel did not require reversal, the decision of the majority is not a departure from the rule laid down in the *Berger* case, the majority, and minority, merely differing on whether or not, in view of certain existing circumstances, the misconduct constituted reversible error.

In *Minker v. U. S.*, 85 F. (2d) 427, where the prosecutor offered to the jury his personal opinion on certain of the facts in the case, the court followed the decision in the *Berger* case, stating:

> "We think the entire tenor of the prosecuting attorney's statements was decidedly and unfairly prejudicial."

Arguments endeavoring to arouse prejudice by the mention of poor people who are alleged to have lost their money are improper. (*London Guar. etc. Co. v. Woelfle*, 83 F. (2d) 325; *Beck v. U. S.*, 33 F. (2d) 107.) We find this improper argument was not overlooked by counsel. Mr. Lazarus stated [R. p. 1223]:

> "Few are villians enough to bilk and defraud those who are ailing spiritually and physically by telling them untruths throughout but I think, gentlemen, in this case we will find these defendants have been doing just that." (Recess.)
>
> "Mr. Lazarus: Gentlemen of the jury, when we took up our recess we were about to discuss the subject matter of healing. We have gone into the experience of Margaret Huntley Schall who had given over a thousand dollars to this movement and originally was interested in an attempt to heal her husband's blindness. To the Government that is one of the most pitiful sides of this case."

We have mentioned other instances where there were references to alleged losses of poor persons. While the Activity received contributions, as every other religious movement receives such contributions, there is no evidence of any losses by poor persons. The argument in reference to Mrs. Schall is particularly cunning because one would

infer from it that Mrs. Schall had contributed one thousand dollars to the movement in an effort to cure her husband's blindness. As a matter of fact, while she became interested in the Activity, as she had become interested in other religions, by reason of her husband's blindness, her husband was killed approximately two months after she had heard of the Ballards and her interest in the Activity, and her contribution to it occurred for the most part thereafter. [R. pp. 395-6.] The quoted argument is artfully worded to arouse prejudice in favor of the wife of the prominent blind Senator. The balance of the references not only shows an attempt to create prejudice but were made without adequate evidence to support the statement, were they pertinent in argument.

The argument that a conviction was necessary to prevent further similar violations of the law was made on numerous occasions. On one, Mr. Lazarus of the prosecution stated:

> "Let your verdict be a warning to those people who would be religious racketeers. Let's clean out the money-changers from the temple. Let's let people know that whenever they go to worship their Maker, their God Almighty, that they are not in the clutches of those who would deceive them for their money under the false and fraudulent representations." [R. p. 1521.]

Again the prosecutor stated:

> "* * * I want this part of the United States to no longer be the part that people more or less smirk about because of some ideas when people go forth and try to defraud someone under the name of God Almighty." [R. p. 1538.]

After conceding to the jury that they had the right to acquit the defendants if they felt they should do so, the prosecution stated:

> "* * * but I feel, and I would like to have you feel so, too, that your verdict be a warning to those who use false representations on the subject matter of religion as a means for their own personal gain." [R. p. 1544.]

After reading from an article in "The Voice" magazine wherein it is stated that the teaching of the "I AM" in the western world would be through the Ballards, Mr. Lazarus stated:

> *"That almost makes you wonder who has the eastern rights if the Ballards have the western rights. And I assure you, gentlemen, if these defendants are found not guilty in this case and let off free, there will be many, many applications for the eastern rights."* [R. p. 1213.]

This type of argument is improper. It has been held improper, for example, to argue that to free a guilty man is "simply a red flag, you might say, to others engaging in law violations," and that to do this would "add flame to the already wave of crime that is sweeping the country." (*Turk v. U. S.*, 20 F. (2d) 129, at 131.) Concerning it this court has stated:

> "* * * It is as fatal to a fair trial and a lawful conviction of a defendant by a jury that their verdict was for a wrong and unlawful reason as that it was caused by incompetent evidence or an erroneous charge."

See also, to the same effect:

United States v. Sprengel, 103 F. (2d) 876.

As stated by Judge Denman [R. 1646]:

> "To complete the succession of violations of due process by the prosecution, one of the prosecutors finished his argument by proposing a conviction because we were then at war. 'You gentlemen are trying this case—this important case I might add—in very unusual times. *The country is at war.* And a case of this sort makes it devolve upon you here to see that the defendants are convicted if you find that they are guilty of fraud *so that those who are fighting for our country will find that they have something to come back to worth fighting for.*' (Emphasis supplied.)"

As to an attempt to create prejudice in the foregoing manner, this court stated, in the recent case of *Viereck v. U. S.*, 318 U. S. 236:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while

> he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"

As we have noted above, the Circuit Court of Appeals in this case sanctions the conduct of counsel as being wholly proper, and it does not attempt to excuse the argument on the ground that the action of the prosecution constituted slight inadvertencies occurring in the heat of argument. Nor would it be possible to excuse the actions of the prosecution on that ground in view of the record. As stated by Judge Denman, in this connection [R. 1639]:

> "This succession of violations of the rights of the defendants continued over two days and two noon recesses. The intervening deliberations in the recesses and overnight continuance led to no withdrawal by the prosecution of any of the previous abuses or false issues raised. Instead they continued through the closing argument. Here is no single unfair act, possibly excusable in the heat of argument as is suggested in the opinion of the court. Here are two days of deliberate and continued striking of the unfair blows of Berger v. United States, 295 U. S. 78, 88, and Viereck v. United States, 318 U. S. 236, 248."

The prosecution's argument, rather than being within the concepts of honorable members of the American bar, constituted a flagrant invasion of the defendants' right of religious freedom and violated every rule laid down by this court and by the Circuit Courts of Appeals as to what constitutes proper conduct of counsel in the argument of a case.

ARGUMENT II.

The Indictment Alleged That the Defendants Made False Representations Pertaining to Religious Doctrine and Teachings Which Representations the Defendants Well Knew to Be False. It Failed to State a Criminal Offense. [Assignments of Error Nos. I, II, III, R. 191.]

The sufficiency of the indictment, viewed in the light of the constitutional guarantees of religious freedom, received much consideration by this Court in its decision. (322 U. S. 78.) It strongly appears the Justices rendering the majority opinion were in grave doubt as to the sufficiency of the indictment. Justice Jackson held that the indictment was insufficient and that the proceeding should be dismissed. In the minority opinion of Chief Justice Stone it was held the indictment did constitute a statement of an offense upon the newly advanced theory of the Government that the indictment also charged misrepresentations by defendants as to their state of mind. However the majority, in conformity with their stated intentions, decided only that the truth or falsity of defendants' religious beliefs should not have been submitted to the jury and remanded the case to the Circuit Court for further determination, stating in conclusion that (322 U. S. 78, at 88):

> "Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved."

This Court does not in the majority opinion determine whether or not the indictment was in fact amended by the

deletion of the "falsity" charges by the trial judge in the midst of the trial, nor does it determine whether or not an indictment presuming it to allege only lack of belief in religious tenets and beliefs could constitute a proper charge under the mail fraud statute, and not be in violation of the First Amendment to the Constitution. (18 U. S. C. A. 338; Sec. 215 Cr. Code.) The majority opinion states (322 U. S. 78 at 85.6):

> "The real objection of respondents is not that the truth of their religious doctrines or beliefs should have been submitted to the jury. Their demurrer and motion to quash made clear their position that that issue should be withheld from the jury on the basis of the First Amendment. Moreover, their position at all times was and still is that the court should have gone the whole way and withheld from the jury both that issue and the issue of their good faith. * * * As we have noted, the Circuit Court of Appeals held that the question of the truth of representations concerning respondents' religious doctrines or beliefs should have been submitted to the jury. * * * *It may be that the Circuit Court of Appeals took that action because it did not think that the indictment could be properly construed as charging a scheme to defraud by means other than misrepresentations of the respondents' religious doctrines or beliefs. Or that court may have concluded that the withdrawal of the issue of the truth of those religious doctrines or beliefs was unwarranted because it resulted in a substantial change in the character of the crime charged.*"

Later in the same opinion this Court states (at p. 88):

> "Respondents maintain that the reversal of the judgment of conviction was justified on other distinct

> grounds. The Circuit Court of Appeals did not reach those questions. * * * We deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved."

Notwithstanding this state of the record, the Circuit Court of Appeals stated that since the Chief Justice, in his dissenting opinion, found no error, it would be presumptuous of it to say that such opinion was satisfactory and errorless. In other words, in effect, the Circuit Court dismissed entirely the majority opinion of this Honorable Court which remanded the case for its further consideration and decision, and, in effect, states that it should, and therefore does, adopt the one minority view on these two questions.

It is incumbent upon this Court to determine, first, whether the gravamen of the indictment alleges misrepresentations of a religious doctrine and is invalid for that reason; and, second, whether, assuming it also alleges misrepresentations of mental condition concerning religious doctrines, it is still in violation of the First Amendment for the reasons given by Justice Jackson and Judge Denman.

Defendants earnestly contend that the indictment does not allege a charge that defendants misrepresented their mental state and that it alleges solely a plan and scheme to defraud based entirely upon alleged misrepresentations as to religious doctrines, the same being enumerated in the indictment specifically in paragraph i, subdivisions 1 to 18, inclusive. [R. 7-20.]

(a) THE ENTIRE INDICTMENT IS BASED SOLELY UPON THE ALLEGED FALSITY OF DEFENDANTS' RELIGIOUS DOCTRINE AND TEACHINGS, AND PLACED ON TRIAL AN ISSUE WHICH UNDER THE DECISION OF THIS COURT CANNOT BE SUBMITTED TO THE JURY.

This Court held, in reversing the Circuit Court, that the trial court was correct in withholding from the jury consideration of the truth or falsity of the religious doctrine and teachings of the defendants. Under this ruling an indictment which charged falsity of religious teachings or doctrine would be in violation of the First Amendment because it would necessarily require the submission of such issue to the jury. Hence, the query is raised: *Does the indictment in this case charge that the religious doctrine and teachings of the defendants were fals ?* In usual and customary language, the indictment alle[illegible]s, as its main intendment, that the defendants *falsely represented* some eighteen religious doctrines and teachings. The only allegations pertaining to disbelief are the incidental allegations that said representations were knowingly made or that defendants "well knew" them to be false.

In other words, the allegation is false representations knowingly made the same as is usual and necessary in any fraud allegation. In every charge of fraud, whether civil or criminal, incidental allegations are properly made to the effect that the representations were knowingly false or were knowingly made with intent to deceive. That is all that was intended in this case. If not absolutely essential, it was deemed proper by the author of the indictment to allege not only the false representation but the incidental feature that the falsity was well known to the defendants. The knowingly made phase of the indict-

ment is the allegation of specific intent. It is the feature which makes a false representation criminal. It is precisely similar to the allegation of "wilfully" as contained in the indictment involved in *Hartzel v. U. S.*, 64 Sup. Ct. Rep. 1233, and which Justice Murphy defined as being the subjective intent necessary under the statute, proof of which is required in addition to proof of the alleged act itself. This is the same intent as was considered specifically to the same effect by Justice Holmes in his dissenting opinion in *Abrams v. U. S.*, 250 U. S. 616. The importance of this element of a charge as pointed out in said cases of *Hartzel v. U. S.* and *Abrams v. U. S.* is particularly stressed in cases involving charges under statutes which have a tendency to otherwise abridge the rights as afforded by the Constitution or its amendments. The Government in preparing its indictment in this case was fully aware of the necessity of not only alleging but proving this specific intent. Nowhere does it distinctly and separately allege that the defendants made representations (irrespective of whether true or false) which they did not believe. At no time prior to its petition for rehearing in the Circuit Court, after reversal by the Circuit Court of the District Court, did the Government raise the contention or advance the theory that the indictment actually charged representations as to a mental state as distinguished from representations of false doctrine.

This Court summarized the indictment as follows (322 U. S. 78, at 79):

> "The false representations charged were eighteen in number. It is sufficient at this point to say that they covered respondents' alleged religious doctrines or beliefs."

This Court recognized on the prior hearing that a serious question exists whether the indictment can be construed as alleging more than misrepresentations of doctrine —in other words, whether it contained any allegations that the defendants had made misrepresentations not concerning doctrine but concerning their state of mind. This Court stated (at p. 86):

> "It may be that the Circuit Court of Appeals took that action (holding that the truth or falsity should have been submitted to the jury) because it did not think that the indictment could be properly construed as charging a scheme to defraud by means other than misrepresentations of respondents' religious doctrines or beliefs. * * *".

This Court then proceeded, rather than to decide this question and other questions reserved, to remand the case to the Circuit Court for its consideration and views as to such matters. (322 U. S. at 88.)

Strip the indictment of all reference to the misrepresentations and leave merely an allegation of disbelief. The then indictment would constitute little more than a shell. It is not sufficient merely to allege a scheme to defraud. The scheme must be stated with all such particulars as are essential to constitute the scheme or artifice and to acquaint the defendant with what he must meet on the trial. (*U. S. v. Hess*, 124 U. S. 483.) The particulars of the scheme are matters of substance and must be set forth with sufficient certainty to fairly acquaint the defendant with the charges against him. (*Savage v. U. S.*, 270 F. 14, 8th.) The scheme so alleged must be substantially the scheme proved by the Government or a conviction will be

set aside. (*Haas v. U. S.*, 93 F. (2d) 427; *Brown v. U. S.*, 146 F. 219, 8th.)

To expect any defendants, presented with an indictment such as the one in this case, to divine that it was intended thereby to charge disbelief by them in religious doctrine and teachings and not false representations concerning religious doctrines, would be beyond reason. This Court, in its majority opinion, indicates that the indictment is one charging false representations, eighteen in number, with the element disbelief being added incidentally as a fraud allegation. Throughout the trial, the trial court, the prosecution and the jury treated the indictment as charging representations concerning religious doctrine which were false.

As pointed out by Judge Denman the trial court, after advising the jury that they would not be permitted to speculate on the actuality of the religious doctrine and teachings, nevertheless permitted the jury to speculate on the "highly improbable" divine and supernatural ability of precipitation. [See Judge Denman's Opinion, R. 1643.] This occurred after the trial court had given the alleged erroneous instruction.

By his statements and by the fact that he later permitted the prosecution attorneys to argue concerning the truth or falsity of the alleged representations, he showed that he still read the indictment as charging falsity of religious tenets.

The indictment charged one thing only—*false representations of religious doctrine knowingly made.* Such an indictment, under the ruling of this court in its prior deci-

sion, is violative of the First Amendment of the Constitution.

(b) CONSTRUING THE INDICTMENT AS CHARGING A LACK OF BELIEF IN THE TEACHINGS OF THE DEFENDANTS, IT WOULD NEVERTHELESS VIOLATE THE PROVISIONS OF THE FIRST AMENDMENT TO THE CONSTITUTION.

Assuming, for the purpose of argument only, the claim of the Government that the misrepresentations charged are of a state of mind and not false representations of religious tenets, an indictment so charging would, nevertheless, be obnoxious to the First Amendment of the Constitution. As heretofore pointed out, this Court, in its prior opinion, did not directly construe the indictment to determine what this particular indictment might require. By the majority opinion this was referred to the Circuit Court for its prior consideration and views. Justice Jackson, however, emphatically and unequivocally stated that the indictment does not state an offense and that it should be dismissed, saying (322 U. S. 78 at 95):

> "I would dismiss the indictment and have done with this business of judicially examining other people's faiths."

True, in the minority opinion of the Chief Justice it is held that the indictment charged both falsity and lack of good faith belief and presumably that such an indictment does not violate the First Amendment of the Constitution. Justice Jackson's opinion is not in conflict with that of the majority, the effect being that he preferred then and there to decide the case in the Supreme Court instead of remanding it to the Circuit Court.

This Court has stated that it will be vigilant in detecting any devices employed for the purpose of restricting religious liberty. It states, in *Murdock v. Pennsylvania*, 319 U. S. 105, at 116, in striking down an ordinance taxing colporteurs:

> "Plaintiff a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

And again (at p. 115):

> "But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found."

This Court also holds in that case that it will not shut its eyes to the destructive influence of a tax upon religious liberty merely because it is seemingly valid, or because it is not discriminatory in its application between those engaged in a business enterprise and those propagating a religion. Religion being in a preferred position, such lack of discrimination will not save an ordinance. If it infringes upon religious liberty it will be declared void, though valid when applied to an ordinary business enterprise.

We submit that the same principles are directly applicable to this case; that if the practical effect of an indictment of this kind is that the right of religious liberty will be infringed upon, it should be dismissed notwithstanding any technical defense which may be offered for its validity;

that it should be sufficient to prevent such a prosecution to show that the *probable* result is that it will have a destructive effect upon such liberty that it will be employed as "a new device for the suppression of religious minorities."

Religious liberty has been held to include the right to (a) practice any religious principle not contrary to public morality; (b) organize religious associations for the expression and dissemination of those ideas (*Watson v. Jones,* 80 U. S. 679), and (c) collect funds by the sale of religious books or tracts, or otherwise, for the maintenance and expansion of the religious organization formed. (*Murdock v. Penn., supra,* at p. 111.) The protection of the free exercise of those rights has been considered so important that excesses and abuses, including a certain amount of exaggeration and false statement are permitted rather than to chance the abridgement of them. (*Martin v. Struthers,* 319 U. S. 141, 149); *Cantwell v. Conn.,* 310 U. S. 295, 310.) The Court has gone so far as to assiduously protect the rights of one sect whose chief object seems to be the abuse and villification of a religion believed in by a great number of our people. (See *Douglas v. Jeannette,* 319 U. S. 157 at 171, also 167.) Opinion and belief are to be allowed to develop unobstructed. (*Cantwell v. Conn., supra.*) With those principles in mind, we believe it must be conceded that Justice Jackson is correct when he states that this case "reaches into wholly dangerous ground." Whether we accept appellants' or the Government's latest interpretation of the indictment, the fact remains that it alleges a scheme to defraud by means of false representations which, when inspected, turn out to deeply involve the tenets of a religion. The formation of the various reading rooms and

sanctuaries of the sect (the equivalent to churches in other religions) and all means employed to disseminate the teachings by means of literature, etc. are alleged in the indictment to be merely part of a scheme to make the alleged false representations. Persons contributing toward the support of the organization are alleged to be the "persons intended to be defrauded," or "persons defrauded." By changing the name of the organization and the description of its tenets an indictment of this kind can be formulated to fit any sect. It will place the Government in a position to persecute and prosecute in a manner which is entirely foreign to our concept of religions liberty. In the fairly long history of religious liberty in this country under our Constitution, it is noteworthy that never before to our knowledge has such prosecution been attempted. Many unusual sects have been formed. Some have become popular and well established and others have perished. Startling and unusual religious claims have been made. However, as far as the Government is concerned, it has been left to the people to separate the wheat from the chaff and to accept or reject as they saw fit, and we never before have accepted the Government of the United States as a censor of one's religion, nor is there any excuse for now so doing. It has been concluded that we can best depend upon freedom of discussion and criticism to expose false prophets and religions. Justice Murphy states in the recent case of *Martin v. Struthers, supra,* at page 149:

> "If a religious belief has substance, it can survive criticism, heated and abusive though it may be, with the aid of truth and reason alone. By the same method, those who follow false prophets are exposed.

> Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."

As Justice Jackson has said, persons may be spiritually poisoned as a result of the course we have chosen, but our people have decided that the price of freedom of religion is worth the chance. As he also points out, the money phase of a prosecution of this nature is of relative unimportance, and we submit the Government, under the guise of an endeavor to prevent persons from being defrauded, should not be allowed to do indirectly what it cannot do directly—test and examine religious beliefs and organizations.

Turning to the Government's construction of the indictment and assuming that it contains representations of belief rather than of false creed, on a trial the result will be the same, to wit, the tenets of a defendant's religion will eventually be submitted to the jury. What will happen in such a trial can be best illustrated by what happened in this case. After the jury had been instructed that the teachings of the defendants were wholly immaterial and their verity not its concern, jurors asked the questions quoted above concerning precipitation. If an indictment can be predicated on mental disbelief, the Government would, of necessity, seek to offer proof as to what were the tenets disbelieved. In this case, the major part of the trial was consumed in proving these tenets. Twenty-one witnesses were examined in connection with the matter of

the theory of ascension taught by the defendants, and the matter arose on sixty-five different occasions. An examination of the record in respect to other tenets will show similar results. The record is replete with the reading and re-reading of defendants' religious doctrines. We submit that after such a trial, if the particular teachings appeared to be queer, unorthodox or unbelievable to the particular jurors, no instruction of the court could erase from their minds a prejudice against the defendants and the conviction that no one could believe in such a religious credo. As stated by Justice Jackson (322 U. S. 78, 93):

> "* * * When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him."

The misconduct of the prosecution which took place in this case illustrates the temptation in a case involving religion to attack and mock other people's beliefs. The trial judge, in spite of his professed intent to protect the religious belief of the defendant, nevertheless encouraged and permitted an argument by two Government prosecutors, sworn to protect defendants' rights, to the effect that their teachings were from the Popular Mechanics and were related to Flash Gordon and Superman and demand a conviction of defendants because they had failed to make supernatural demonstrations before the jury.

To a greater or lesser extent the same things will occur in every such case. An argument by a prosecutor to the effect that the governme has proved a charge, such as the Government attempts to make in a case of this kind,

is incompatible with the treatment of the tenets of a defendant's religion with reverence and respect.

The next objection to an indictment charging lack of belief is that, as Judge Denman points out in his dissenting opinion, the defendants would be prohibited from advancing the best proof that they could have of the sincerity of their belief, to wit, the actual truth of the doctrine or teaching referred to. [See Judge Denman's illustration, R. 1656-59]; note further, Judge Denman's statements, as follows:

> "The validity of that demurrer (defendants') must be determined in the light of the holding of the Supreme Court that, if one be charged with using the mails to defraud by false representations of one's religious experiences, he may not in his defense prove the experiences to have occurred.
>
> "It is my view that the First Amendment, so denying a man the most potent proof of his innocense, is violated by the indictment in this case. *An interpretation holding the indictment valid would convert the First Amendment into a torturing instrument, cruelly hamstringing an innocent accused in his attempt to escape from the legal meshes woven by a religiously antagonistic grand jury.*
>
> *"It is also my view that Congress did not intend to create an offense in which not only is the innocent accused so mangled in his defense, but also the government is denied the right to prove the represented happenings were venal and cruelly deceiving falsehoods."* [R. 1655-56.]

And this is precisely what Justice Jackson says in his dissenting opinion (322 U. S. 78, at 92-93):

> "In the first place, as a matter of either practice or philosophy, I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."

There is a further reason that an indictment charging merely lack of belief is readily susceptible to the abuse of being used as a means of religious persecution. When one charged with lack of belief is without evidence of supernatural intervention he can only answer the assertions of the Government that he does not believe by affirming that he does. Wholly lacking is the proof usually available when a similar charge is based on a commercial transaction. Then the evidence from which the defendant formed his belief is available for investigation. Assuming such bare assertion of belief as against apostate expression of non belief constitutes a conflict in the evidence for the jury to determine, the protection given the religious is meager, if any. Why so much bitterness and controversy exist in religious matters is difficult to understand. But one is impractical indeed who does not determine matters in the light of their existence. Apostates

and enemies of a particular sect are always available to testify that a religious leader made statements indicating that he did not believe what he taught. That method of proof was attempted by the Government in this case. The admittedly dishonest witness, Smith, was brought from the State of Florida to testify that the defendants had stated to him that they did not believe in their teachings. No doubt, better witnesses would usually be available at less distance, and we submit that to allow such a course is to forge "a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor." Our efforts should be directed toward stamping out religious persecution.

We wish also to call to the court's attention that an indictment of this character encroaches upon the right to religious freedom in another direction. Less than full belief in the tenets of a professed religion is, as Justice Jackson states, common in this country. The most religious sometimes admit a doubt concerning certain tenets. As Justice Jackson states at p. 94:

> "* * * Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges."

He states the crux of the matter in this connection when he asks (p. 95):

> "When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies?"

During oral argument of this case Justice Rutledge, in an attempt to find out how far the Government maintained it could go, queried Would a husband who adopted his wife's religion for the purpose of domestic tranquility and solicited funds professing belief be guilty of actionable fraud? Similar questions affecting any creed could be formulated. Is a religious teacher, who professes belief that the Bible is the word of God and privately confesses doubt concerning the story of Jonah and the whale, guilty of actionable fraud? Is a Catholic priest who teaches, but privately questions, that Saint Anthony had the power of dual presence (similar to defendants' concept of projected consciousness), or that Saint Anthony talked with Jesus (see Catholic Encyclodedia, Vol. 1, p. 557; also, Lives of the Saints, Baring-Dould, p. 184 and p. 188) (similar to defendants' shaking hands with Jesus) guilty of actionable fraud? We submit that Justice Jackson correctly states that vagueness in the determination of this question results in the possible degeneration of prosecutions of this character into religious persecutions. Leaders of religious sects should not be subject to prosecution whenever persons come forth with testimony that he, or she, has expressed privately a doubt in connection with teachings he or she professes.

We submit that an indictment whether viewed as alleging misrepresentations as to creed or belief in a creed is equally vulnerable to the objection that it violates the religious liberties of a defendant guaranteed under the First Amendment.

ARGUMENT III.

The Indictment Was, in Fact, Amended and the Defendants Were Not Tried on an Indictment Returned by the Grand Jury.

[Assignments Nos. XIV, XV, XVI, R. pp. 194 to 197, incl.]

During the course of the trial the District Court removed issues contained in the indictment concerning the truth or falsity of experiences of the defendants with the Ascended Masters, the truth or falsity of the existence of the Ascended Masters, and the truth or falsity of religious concepts and beliefs of defendants, the Court having stated [R. 195-7]:

> "First, the defendants in this case made certain representations of belief in a divinity and in a supernatural power. Some of the teachings of the defendants, representations, might seem extremely improbable to a great many people. For instance, the appearance of Jesus to dictate some of the works that we have had introduced in evidence, as testified to here at the opening transcription, or shaking hands with Jesus, to some people might seem highly improbable.
>
> "I point that out as one of the many statements.
>
> "Whether that is true or not is not the concern of this Court and is not the concern of the jury—and they are going to be told so in their instructions As far as this Court sees the issue, it is immaterial what these defendants preached or wrote or taught in their classes. They (the jury) are not going to be permitted to speculate on the actuality of the happening of those incidents. Now, I think I have

made that as clear as I can. Therefore, the religious beliefs of these defendants cannot be an issue in this court.

"The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.

"If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty.

"Therefore, gentlemen, religion cannot come into this case. I want to assure Judge Armstrong and the defendants and the Government that it will not be permitted to come in.

"Now, we take up the third point, so there is going to be no misunderstanding so far as the Court is concerned.

"No attack can be made, therefore, on whether or not these things happened, but when you have a program or you have certain representations set out, you have got to show what they were. And the defendants, I assume, from counsel and counsel's statements with reference to the books and pamphlets, have not so far withdrawn a single word of what they have written or what they have preached. The defendants, so far as I can gather it from the case, although they haven't started to put it in, are standing on the whole—not program, but the whole conception (I think that is a better word)—the whole

conception of their relationship with the Deity or, as it is used here, with the I AM Presence.

"Now, gentlemen, that is going to be made so clear to this jury that they are not going to misunderstand it. And that is the whole case."

This resulted in a denial of the constitutional right to be tried on an indictment returned by the grand jury.

By plain language the indictment charged false representations as to religious doctrine and teachings knowingly made by defendants.

Commencing, however, at the time that the aforesaid instruction of the court was first given, the court stated the case would be treated as if the word "false" were deleted from the indictment and as if the indictment did not, in fact, allege false representations, knowingly made, but that the defendants made representations that they did not believe. The law is, of course, well established that a defendant is entitled to proceed to trial upon an indictment returned by a grand jury. This is guaranteed by Article V of the Constitution.

Ex parte Bain, 121 U. S. 1, is perhaps the leading case on the inpropriety of the court amending an indictment. In that case the defendant was convicted of an indictment returned by the grand jury charging him with making false statements as a cashier of a banking association with intent to deceive the comptroller of the currency and the bank examiners. The trial court amended the indictment by striking therefrom the allegation of the indictment that intent had been to deceive the comptroller of the currency. This Court granted a writ of habeas corpus and held that a trial on an amended indictment is void and that the court had no jurisdiction

to proceed. As in the case at bar, the theory of the trial court and prosecution in that case was that the striking of the allegation as to the intent to deceive the comptroller did not prejudice the defendant. There, as here, it was urged, that the striking, in effect, of the word "falsely" did not prejudice the defendants. But this Court held, in the *Bain* case, that such an amendment amounts to a defendant being tried upon an indictment not returned by the grand jury, as provided by the Constitution. The same principle of law is recognized in *United States v. Norris,* 281 U. S. 619, 74 L. Ed. 1076; *Dodge v. United States* (2nd Circuit) 258 Fed. 300, certiorari denied, 250 U. S. 660; *Stewart v. United States* (9th Circuit) 12 F. (2d) 524 and in *Edgerton v. United States,* 143 F. (2d) 697 (9th Circuit). In the recent *Edgerton* case, cited above, the defendants were charged with a scheme to improperly deplete certain assets of a corporation for their own aggrandizement which scheme, as stated by the court, was probably complete without the presence of misrepresentations of any kind being made by them. However, the indictment in that case charged that certain misrepresentations were made that investments would be only upon a certain kind of security. This additional charge was, in effect, stricken by the court. This was not a physical striking but was by a direction to the jury in similar fashion as in the case at bar. The Ninth Circuit held that the result of such action was to so change the alleged misrepresentation that the jury might have rested its findings upon a part of the charge different from that found in the indictment as returned by the grand jury. The alteration in the amendment permitted in this case was much more flagrant than in the *Edgerton* case. As just one example, it should be noted that by the court removing the allegation of falsity of representations as

an issue that the Government was relieved of perhaps the most difficult burden that it had assumed under the indictment, to wit, the proving that the religious teachings, doctrine and tenets of the defendants were in fact false.

The trial court also amended it by extending the purported representations concerning belief. He stated that a conviction was warranted if the defendants "did not believe the things that they taught, the things that they preached." This statement was in no wise limited to the indictment. If they taught or preached things they did not believe they could be convicted *even though the indictment does not allege that they represented they believed those things.* This was an amendment of the indictment by enlarging and changing its scope even under the Government's construction of it. Under that construction the defendants could not be charged with misrepresenting that they believed more than the particular things therein set forth.

In conclusion, we remind this Court that on the former hearing it considered, but left undecided, preferring to remand to the Circuit Court for consideration, this question of amendment of the indictment. On page 86, the court states:

> "* * * Or that court may have concluded that the withdrawal of the issue of the truth of those religious doctrines or beliefs was unwarranted because it resulted in a substantial change in the character of the crime charged. * * *"

It is respectfully submitted that the indictment was, in fact, amended and therefore the defendants were not tried upon an indictment returned by the grand jury.

ARGUMENT IV.

The Constitutional Rights of Defendants Were Violated by Reason of Discrimination in the Selection of the Jury by the Exclusion of Women Therefrom.

Before the jury was called, the defendants, jointly and severally, challenged the entire petit jury panel on the ground that there had been a discrimination in the selection of the jury by the exclusion of women therefrom. [R. p. 232.] At that time a stipulation was entered into between counsel for the Government and for the defendants that in summoning the jury no women were called solely because of the fact that they were women and following the usual practice in the District and that "it was always the practice of the judges of this court not to use women." [R. pp. 232-233.]

Theretofore and prior to plea on the merits the defendants, by motions to quash and a motion to strike the indictment, had objected to the grand jury panel on the same ground. [R. pp. 110, 145.] Both motions were denied.

The defendants assigned as errors the error of the court in overruling the challenge to the petit jury [Spec. V and IV, R. 192] and also the error overruling the defendants' motions to quash and to strike the indictment on the ground the grand jury had been improperly selected. [Spec. II and III, R. 191.]

This case, therefore, squarely presents (for the first time as far as we can ascertain) the important constitutional question answered by Judge Denman as follows:

> "It is a violation of the due process clause of the Fifth Amendment and impartial jury clause of the Sixth Amendment for the clerk of the court and the jury commissioner, on the order of the court, to exclude from the jury lists one-half of all the persons —that is all the women—eligible for the trial of a mother and son on the charge of misrepresenting their religious beliefs and experiences miraculous in character." [R. 1648.]

The question was fully presented to the Circuit Court of Appeals but that court, in its original opinion of nine lines, brushed aside this, as well as the other contentions of the appellants, with a statement that all questions had been considered but that the court had found no error warranting a reversal. When the appellants pressed for a more adequate consideration of their contentions by petition for rehearing the majority of that court responded, insofar as the question here presented is concerned, with the following statement:

> "Our dissenting associate holds that it was reversible error for the trial court to proceed to trial with a jury selected from a jury list made up intentionally of males only. As heretofore stated, the point was raised and presented to the Supreme Court and was given no mention in any of the Justices' opinions. In the circumstances of this case we find no error." [R. 1637.]

The portion of the opinion quoted above affirmatively shows, when considered in relation to the opinion of this court, that the present contention of appellants was disregarded for an entirely erroneous reason. In the very opinions referred to the majority of this court stated, concerning grounds for reversal reserved by appellants and not adverted to therein, as follows:

> "But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved." (322 U. S. 78 at 88.)

Justice Denman dissented not only from the conclusion reached but from the course pursued in the treatment of appellants' contention. He points out that appellants' contention was fully presented by argument with supporting authorities [R. 1640] and states concerning the majority opinion on denial of rehearing [R. 1641]:

> "I dissent not only from this refusal of the court to state its views for the benefit of the Supreme Court *but from what, in effect, is a majority opinion cast in the form of a bald dissent from a reasoned* dissenting opinion."

He then proceeds to set forth fully his reasons for reaching the conclusion that there existed in the case a denial of the appellants' constitutional rights in the selection of the petit and grand jury. That opinion was apparently before the Justices when the majority opinion was written. [See R. 1637.] The failure of the majority to do more

than file a "bald dissent from a reasoned dissenting opinion" indicates, we submit, the cogency of Judge Denman's reasoning contained in it.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The selection of jurors in the federal court is governed by Secs. 275 to 288, inclusive, of the Judicial Code (U. S. C. Title 28, Secs. 411 to 426, inclusive) but particularly by Secs. 275 and 276 of the Judicial Code. (U. S. C. Title 28, Secs. 411 and 412, which are as follows:

> "Jurors; qualifications and exemptions. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.
>
> "SAME; MANNER OF DRAWING. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed

> therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."

It is undisputed that under the California law touching upon the qualifications of jurors, which must be looked to by reason of the language of Section 275 of the Judicial Code, women are qualified to act as jurors in that state. Section 190 of the Civil Code of California provides that a jury is a body of *persons* temporarily selected from the *citizens* of a particular district. A grand jury is similarly defined by Section 192 of that code. The word "persons" which appears in those sections was inserted in 1917 in lieu of the word "men." (Cal. Stats. 1017, p. 1282.)

Section 198 of the Code of Civil Procedure of California provides that a person is competent to act as a juror if he or she be a citizen of the United States and resident of the state and county for one year. As stated by Judge Denman [R. 1650]:

> "It is also a fact that in California women have participated in the governmental function of indictment by grand juries and trial by petit juries for twenty-eight years. Cf. In re Mana, 178 Cal. 213."

The recent decision of this court in *Glasser v. United States*, 315 U. S. 60, supports the contention of the appellants that their constitutional rights were abridged by the systematic and arbitrary exclusions of women from the grand and petit juries. In the following quotation from that case this court lays down the rule as to what constitutes a proper jury (at p. 85):

> "Our notions of what a proper jury is have developed in harmony with our basic concepts of democratic society and a representative government. For 'it is part of the established tradition in the use of juries as instruments of public justice *that the jury be a body truly representative of the community.*' (Smith v. Texas, 311 U. S. 128, 130.)
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> "Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Secs. 275, 276, Jud. Code; 28 U. S. C. Secs. 411, 412. This duty of selection may not be delegated. United States v. Murphy, 24 F. 554, in re Petition for Special Grand Jury, 50 F. (2d) 973. *And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class.* If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. *But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.* Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a

> representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties."

We feel that, as Judge Denman states, the *Glasser* decision "makes clear that *today* the 'impartial jury' of the Sixth Amendment has as one of its determinants the character of the grand and trial jury lists as 'truly representative of the community' with respect to the exclusion therefrom of qualified women." [R. 1650.] As he also points out, the participation of women in public affairs as well as the realization of their contribution to the affairs of the state and nation was a gradual growth. It is not important that at an earlier date an interpretation of these constitutional guarantees might have sanctioned the exclusion of women from jury panels. Only the *principles* of a constitution remain fixed and unchanged from the time of its adoption. It must be construed as if intended to stand for a long period of time and it is progressive and not static. The meaning given to it should be applied in such a manner as to meet new or changed conditions which arise and it should be construed in the light of exigencies and conditions which it was intended to meet and deal with. (16 *Corpus Juris* Sec. 49.) In construing a constitution one should look to the nature of the right

> "with all the light and aid of contemporary history and give to the words * * * such operation and

force * * * as may fairly secure and attain the ends proposed." (*Prigg v. Penn*, 16 Pet. 539, 10 L. Ed. 1060.)

As Judge Denman points out, this court has held that no mathematical formulae are provided by the great concepts of the constitution. In maintaining the balance of constitutional grants and limitations, it is inevitable that they should be defined in the gradual process of inclusion or exclusion. (*Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 467.) We submit that it cannot now be said that in view of the recognized participation of women in public affairs that a jury panel on which they are systematically excluded, without reason, results in a jury truly representative of the community and not an organ of any special class.

While what is said in the portion of the *Glasser* case quoted above was said in connection with the selection of women on the petit jury from the members of the Illinois League of Women Voters, in another portion of the decision directed to the question of error in the selection of the grand jury by excluding women from the panel, this court strongly indicates that but for the fact the Illinois law placing women on the jury list was of such recent origin that they were not required to be on all the jury lists, the contention that there was error in the selection of the grand jury would have been sustained. After pointing out that in most of the counties comprising the district involved women were not required to be on the jury lists until a date after which the grand jury was selected, this court stated (at p. 64):

"* * * Of course, for women to serve as federal jurors in Illinois it is not necessary that their names

> appear on the county list, *but we are of the opinion that, in view of the short time elapsing between the effective date of the Illinois Acts and the summoning of the grand jury, it was not error to omit the names of women* from federal jury lists, where it was not shown that women's names had yet appeared on the state jury lists."

The general question here presented has been considered in but few cases. In none of them was the appealing defendant a woman. Most of the cases are prior to the decision of this court in *Glasser v. U. S., supra.*[3]

In *U. S. v. Roemig,* 52 Fed. Supp. 857, the only case subsequent to the *Glasser* decision wherein it is considered (aside from the decision of Judge Denman in the case at bar) the District Court held, on the authority of that case, that the indictment should be quashed for discrimination against women jurors in the selection of a grand jury. This decision contains an extended and excellent discussion of the question. Relying upon the language of the *Glasser* case to the effect that a jury must be truly representative of a community and not the organ of any special group or class, the District Judge quashed the indictment against the defendants. The court states (at p. 862):

> "Upon an indefensible basis, as identified one-half or more of those eligible to jury service in this district have been arbitrarily excluded from such service, not by accident or inadvertence, but by design. Such

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[3]See *Wuichet v. U. S.,* 8 F. (2d) 561 (1925); *U. S. v. Ballard,* 35 Fed. Supp. 105 (1940); *U. S. v. Pelly,* 132 F. (2d) 170, was subsequent but wholly overlooks that decision in discussing the point.

action is operative to destroy the basic democracy and classlessness of jury personnel. It results in the consistent selection of jurors from a group or portion only of those available for service in that office, rather than from those eligible without discrimination. And that does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him."

After reference to the *Wuichet* and *Ballard* cases the judge, in the *Roemig* case, states (at p. 860):

"But the federal authorities cited, and the state court opinions examined by this court, all antedate by several years the Supreme Court's opinion in Glasser v. United States, 315 U. S. 60, in which an attitude of direct disfavor was intimated towards the practice pursued in this instance. In the Glasser case the legal constitution of a federal grand jury in an Illinois district was challenged, on the ground that women had been deliberately excluded from its membership. The challenge failed, not because it was necessarily ill founded as a legal criticism, but rather because the Illinois legislation opening jury service to women had been enacted only recently before the assembling of the grand jury and under its own terms was not yet of universal application throughout the counties within the federal district."

If women constitute a separate class and if that class is of sufficient size and importance, that it is respectfully submitted by appellants that under the decision of this court in the *Glasser* case that the jury must be a body truly representative of the community, the grand and petit juries in this case were not properly constituted.

That women represent a distinct class, by reason of their position in society, has been universally recognized for many years in this country. The exercise of the police power in respect to hours, minimum wages, types of employment are predicated upon women constituting a distinct class universally upheld. (*Ex parte Miller*, 162 Cal. 687, 124 Pac. 427; *State v. Muller*, 48 Ore. 252, 85 Pac. 855.)

In connection with the matter of defendants showing prejudice in a case of this kind, we do not concede that such burden rests upon them. This purely arbitrary denial of a defendant's rights can be perpetrated indefinitely if the appealing defendant is not granted a reversal after such denial by the trial court. We submit the correct rule, for this situation is set forth in the *Roemig* case where the court held that the inquiry should be simply whether a defendant has been indicted by a grand jury selected as he had a right, under the law, to expect and to require it to be selected.

> "That inquiry answered negatively, the indictment ought to fail, without requiring the doubtfully possible proof of concrete injury to the moving defendant."

The court held that the argument of lack of prejudice "cannot be allowed to sustain and perpetuate the arbitrary perversion by administrative authority of the plain mandate of the law on a fundamental question." (p. 862.) The court further states:

> "The government of the United States, by which the rights of its citizens under the law should be jealously guarded, cannot itself be allowed the optional privilege of lawlessness in bringing those citi-

> zens before the bar of justice. It must not violate the law which it promulgates for the preservation of its own existence and majesty and dignity; and then demand that its courts resolve in its favor a doubt whether its violation of the rights of the citizen has subjected him to practical injury." (p. 862.)

Furthermore, in a case of this kind prejudice from the error will be presumed. (*Ah Fook Chang v. U. S.* (9th Circuit), 91 F. (2d) 805.) It was there held that where the record on appeal shows that the error which occurred was not prejudicial, no reversal is required but that,

> "* * * if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

The court relied upon *Little v. U. S.*, 73 F. (2d) 861, wherein it is stated that:

> "* * * where error occurs which, within the range of reasonable possibility, may have affected the verdict of a jury appellant is not required to explore the minds of the jurors in an effort to prove it did in fact influence their verdict."

However, if we are incorrect in the foregoing, we submit that it is apparent that Mrs. Ballard and her son are prejudiced here when in an action involving spiritual concepts all women are barred from the jury panels and where, in a trial of a woman, all persons of her sex are barred from hearing the case.

The Government has heretofore relied upon but has refrained from engaging in a discussion of the case of *U. S. v. Ballard*, 35 Fed. Supp. 105. We respectfully

submit that the decision of the Court in that case is erroneous when it proceeds upon the premise that the question of error in the selection of a jury is settled by determining whether or not California courts have held that the use of women on juries is mandatory. The District Court, in that case, states the question to be as follows (p. 107):

> "Did this substitution of words (in the California code sections) make the use of women on juries in California, and, consequently, in the federal district courts of California, obligatory?"

The court, in effect, assumes that what is left to the state law is the question of *what constitutes a proper jury,* when by Section 275 of the Judicial Code what is actually left to state law is merely the question of *who is qualified to act as a juror.* The latter being determined from a perusal of the state law, the state law then becomes immaterial. Once it is determined that women are qualified to act as jurors in California, it is immaterial that the courts of that state may have held that they need not be included in selecting a panel, that the sections are directory only and may, to some extent be ignored, or that prejudice must be shown by a defendant before the decision of a jury not properly constituted will be set aside. *None of these questions is left to state law.* The question of whether the method of selecting a jury in the federal court is or is not proper must be determined by an interpretation of the Constitution and the Fifth and Sixth Amendments thereto. This error of the trial court,

in that decision, is recognized by Judge Denman, when he states [R. 1653-4]:

> "However, had the California courts held that no one could possibly be prejudiced by the intentional exclusion of women from the jury, it would in no way be binding on the federal district court. The dictum to the contrary of the District Court in the earlier Ballard case is not supported by the statute upon which it relies. The jury provisions of the controlling federal statutes are solely concerned with the states' 'qualifications' for jurors, here in California. They nowhere require or justify the purposeful *exclusion* of half the persons so 'qualified' from the jury lists because a state court so holds."

The decision of the trial judge in the *Ballard* case was written before the decision of this court in the *Glasser* case. Judge Denman further points out that in the California cases relied upon by the trial court therein, the decisions turned on an alleged lack of prejudice rather than lack of error. Men were tried by a jury composed solely of men, or a woman by a jury composed solely of women, and that in the latest decision of the Supreme Court of California "that court considers the exclusion of women from the jury lists may be prejudicial." (See *People v. Purman*, 14 Cal. (2d) 17, 20.)

The Government has also contended that the decision on a motion to quash is not reviewable. If correct, of course, the contention would affect only the erroneous discrimination in the selection of the grand jury. As observed, defendant challenged the petit jury below at the outset, and exception was allowed to the court's order overruling the challenge. We submit that it is an answer

to the contention that this court, in the *Glasser* case, considered the error by reviewing the order made on defendant's motion to quash. (See p. 62 of the decision.) Likewise, in *Smith v. Texas,* 311 U. S. 128, judgment of conviction was reversed because of the failure of the state court to grant the defendant's timely motion to quash the indictment. In *Wuichet v. U. S.,* 8 F. (2d) 561, failure to make such a motion was stated to be an insuperable objection to raising the question on appeal.

Conclusion.

Religious freedom with freedom of speech is the blood and lifestream of the Constitution. By reason of these liberties this government has prospered and has become the mightiest force and power for good on earth. It is the grave responsibility of this Court to preserve these liberties and not to permit them to be whittled away and undermined through any ingenious methods.

It is the duty of this Court to be vigilant to protect both and to define our rights in a forceful manner. While it is well to know that in the matter of religion men may believe what they cannot prove and that their views cannot be made suspect before the law, the continued protection of the right as so defined is all important and requires that substance be given to the words.

If, when a case is presented where the prosecuting attorneys of the United States Government ridicule the religion of the defendant and taunt and challenge him for not bringing in signs of supernatural intervention, such misconduct receives the stamp of approval of a Circuit Court, as in this case, one must conclude that we have

lost the power to translate the abstract definitions of our rights into concrete protection. Not only must cases of obvious violation of our rights be acted upon by this Court with diligence, but new subterfuges and new devices seeking to destroy the right must be dealt with for what they are and not supported because theoretically they appear to comply with the rules of pleading.

This case represents what is bound to become a pattern for future conduct of our government toward religious freedom. We believe this Court should pause and carefully consider whether it wishes to place a stamp of approval upon an indictment which, as thus far interpreted, would permit the conviction of leaders of minority religious sects solely by proof of lack of faith. As new religious sects arise or old ones are attacked, their members should not be left to the tender mercies of an hostile jury, stirred on by an uncontrolled prosecution, as to whether they have sufficient faith to permit them to continue the propagation of their religion.

Wherefore, for the reasons stated and the showing made, it is respectfully submitted that this petition for a writ of certiorari be granted.

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